NOVA SCOTIA COURT OF APPEAL
Citation: *MacDonald v. MacDonald*, 2017 NSCA 18

Date: 20170216
Docket: CA 448299
Registry: Halifax

Between:

Cheryl Lynn MacDonald

Appellant

v.

Lawrence Bernard MacDonald

Respondent

Judge: The Honourable Justice Linda Lee Oland

Appeal Heard: September 8, 2016, in Halifax, Nova Scotia

Subject: *Divorce Act*, s. 15.2(4) and (6) – Spousal Support – Quantum – Spousal Support Advisory Guidelines – Duration – Costs

Summary: During the 25 years of their marriage, Mr. MacDonald had been the main breadwinner and regularly earned over $150,000 annually. Ms. MacDonald, the primary caregiver of their children, had little work experience. After their separation, he became unemployed and filed for bankruptcy. Ms. MacDonald found work of various kinds. After 14 months, Mr. MacDonald was rehired. Both parties were unemployed at trial.

The trial judge found that Ms. MacDonald was entitled to spousal support at separation, on both compensatory and non-compensatory grounds. No arrears for the 14 months when Mr. MacDonald was unemployed were awarded. The judge ordered payment of arrears of $1,000 per month from November 2014 to and including September 2015, for a total of $11,000, spousal support of $1.00 per year effective January 2016, and each party to bear their own costs.

Issues: Whether the judge erred in (a) setting the quantum of retroactive spousal support; (b) ending retroactive support in September 2015; (c) in setting the quantum of ongoing support; (d) in determining that the appellant was self-sufficient; and (e) in his award of costs.

Result: Appeal allowed. While the monthly spousal support he awarded for the period that Mr. MacDonald was working and able to pay might satisfy Ms. MacDonald's need as reflected in her monthly deficit, it did not address or satisfy the compensatory aspect of her entitlement that the judge had identified. The judge's reasons did not explain why he terminated those payments a month before Mr. MacDonald stopped working. The amount of the spousal support was increased and payment extended for a further month. The judge did not determine that she was self-sufficient based on her re-partnering, and committed no error in setting the quantum of ongoing spousal support, or his award of costs.

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Appellant

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Lawrence Bernard MacDonald

Respondent

Judges:	Beveridge, Oland and Farrar, JJ.A.
Appeal Heard:	September 8, 2016, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Oland, J.A.; Beveridge and Farrar, JJ.A. concurring
Counsel:	Wayne J. MacMillan, for the appellant Tammy C. MacKenzie and Lauren Murphy, Articled Clerk, for the respondent

Reasons for judgment:

[1] The parties themselves settled all matters pertaining to their divorce, with the exception of spousal support. Justice N.M. Scaravelli determined the issues of entitlement and quantum, both retroactive and prospective. The appellant, Ms. MacDonald, appeals from his decision dated January 7, 2016 (2016 NSSC 10) and his Corollary Relief Order dated February 2, 2016.

Background

[2] The parties married in 1988. Theirs was a traditional marriage, in that the respondent, Mr. MacDonald, was the main breadwinner for the family, and Ms. MacDonald was the primary caregiver of their two children who are now independent adults.

[3] In September 2013, after 25 years of marriage, the couple separated. Mr. MacDonald was then 49 years old, and Ms. MacDonald 45 years old.

[4] Mr. MacDonald is a miner. During the early years of their marriage, the parties moved to Ontario for his employment. In 2001, the family settled into their new home in Nova Scotia.

[5] Mr. MacDonald's work often took him overseas. For years, he was away most of the time. He worked in Indonesia until 2006 on a rotating schedule where he was away four months and home for six weeks. From 2006 to 2008, he was away working four weeks, and home two weeks.

[6] Over the last 20 years, Mr. MacDonald's annual wages were typically in the range of $150,000 plus. For example, in 2010, he earned over $173,000; in 2011, over $149,000; and, in 2012, over $162,000.

[7] Ms. MacDonald worked sporadically during the marriage – a few occasions as a waitress prior to 1995, and data entry and receptionist work in 1995-1996. She operated a dog grooming business from the home for some four years starting in 2004.

[8] In September 2013, the month the parties separated, Mr. MacDonald became unemployed. For the next 14 months, his only source of income was employment insurance. In May 2014, he filed for bankruptcy. He sent his half of the net proceeds from the sale of the family home to the Trustee in bankruptcy. After he

started working again, he paid the Trustee $4,000 a month against his outstanding debt, including matrimonial debt.

[9] In November 2014, Mr. MacDonald found a job in Saskatchewan and worked until June 2015. Six weeks later, he started work again and was employed until early November 2015. In that 12-month period, he earned approximately $154,000, his usual annual earnings.

[10] After the separation, Ms. MacDonald supported herself in various ways. The first two months, she did odd jobs in Mabou. After relocating to Fort McMurray late in 2013, she was a janitor for two months. Her total income in 2013 was $2,372.

[11] Next Ms. MacDonald worked as a tool crib attendant for three months. After returning to Cape Breton, she was a waitress for some five months. She then returned to Fort McMurray, where she shovelled snow from November 2014 to February 2015, and shovelled and scraped bitumen in March and April. Through a laborer's union, she was able to find work shovelling and raking, for parts of the remainder of 2015.

[12] In 2014, Ms. MacDonald earned $45,249 and, in 2015, approximately $72,000. Since October 2015, she had been living with Keith Sutherland, who pays half the rent.

[13] When the parties appeared before the judge in December of 2015, both were unemployed. Ms. MacDonald had been laid off that month, and Mr. MacDonald the previous month. Both were receiving employment insurance, and hoped to be called back to work. By then, Mr. MacDonald had made seven $4,000 monthly payments to the Trustee in bankruptcy. He owed a further three such payments.

[14] In his unreported decision, the judge found that Ms. MacDonald was entitled to spousal support at the time of separation, both on compensatory and non-compensatory grounds. He did not order any arrears of spousal support for the 14 months following their September 2013 separation when Mr. MacDonald was unemployed. He ordered Mr. MacDonald to pay arrears of spousal support of $1,000 per month from November 2014 to and including September 2015, for a total of $11,000.

[15] The judge held that, regardless of Ms. MacDonald's entitlement to support, Mr. MacDonald was not in a position to pay support "at this time". He ordered

him to pay her spousal support of $1.00 per year effective January 1st, 2016. Each party was to bear their own costs. Later, I will review his decision in greater detail.

Issues

[16] I condense and restate the several grounds of appeal as follows:

1. Did the judge err in setting the quantum of retroactive spousal support;
2. Did he err in ending retroactive support in September 2015;
3. Did he err in setting the quantum of ongoing support;
4. Did he err in determining that the appellant was self-sufficient; and
5. Did he err in his award of costs.

Standard of Review

[17] This Court applies a considerable level of deference in reviewing decisions by trial judges which set out support obligations, because of their fact-finding and discretionary nature. An appellate court is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently. It will intervene only when there is a material error, a serious misapprehension of the evidence, or an error in law: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at ¶ 12. See also *Ezurike v. Ezurike*, 2008 NSCA 82 at ¶ 6.

Quantum of Spousal Support

[18] The judge's finding that Ms. MacDonald is entitled to spousal support is not contested on appeal. All the issues focus on what he found to be the appropriate quantum or amount, and its duration. Under this heading, I will consider the arguments that the judge erred in setting the quantum of retroactive support, by failing to consider Mr. MacDonald's pattern of earnings, by failing to consider the statutory objectives in relation to spousal support, and by failing to consider the Spousal Support Advisory Guidelines (the "Guidelines").

[19] The judge's reasons are not lengthy. Including the granting of the divorce order, they amount to 27 paragraphs. The judge found that Ms. MacDonald had taken reasonable steps to obtain self-sufficiency and noted that, since October 2015, she had lived with Mr. Sutherland. Her December 2015 Statement of

Expenses, taking into account Mr. Sutherland's monthly $1,000 contribution to the rent, showed a monthly surplus of approximately $2,250.

[20] The judge recounted that Mr. MacDonald had earned over $150,000 annually for a number of years, and his monthly $4,000 payments to the Trustee were being applied in part against matrimonial debt. He added that Ms. MacDonald, who had not filed for bankruptcy, would also be responsible for those debts.

[21] The judge then observed that Mr. MacDonald was presently unemployed. Before taxes were factored in, his income in 2014 was $21,000, and in 2015, it was $150,000. According to the judge, when income taxes were factored in, he would have had a monthly surplus of approximately $3,300 in 2015.

[22] The judge's reasons proceeded to deal with entitlement to spousal support, quantum and duration:

> [20] I find the petitioner was entitled to spousal support at the time of separation both on a compensatory and non-compensatory ground.
>
> [21] **I have considered the means, needs and circumstance of each spouse.** Following separation until October 2014, the petitioner was in need of spousal support. However, the respondent had no ability to pay. **From November 2014 to and including September 2015, the petitioner was in need of spousal support and the respondent had the ability to pay. As a result, I would order spousal support payable for this period at the rate of $1,000 per month for a total of $11,000.**
>
> [22] The petitioner has demonstrated an ability to be self-sufficient over the past two years by earning sustainable income. She has entered into a relationship that enables her partner to contribute to her expenses. However, at the present time the petitioner is laid off and in receipt of EI benefits. Although she is hopeful of a recall to work, this is not guaranteed.
>
> [23] **Regardless of the petitioner's entitlement to support, the respondent is not in a position to pay support at this time.** The respondent is also presently in receipt of EI benefits. His prospects for recall by his employer appear to be favourable.
>
> [24] **In order to preserve the petitioner's right to support in the future, regarding any material change in circumstance, I order the respondent to pay the petitioner $1.00 per annum spousal support effective January 1st, 2016.** The parties will be required to exchange financial disclosure annually as long as spousal support is payable.
>
> [Emphasis added]

[23] I pause to point out what is not being appealed. Ms. MacDonald does not contest the decision to deny her retroactive spousal support for the period from separation to November 2014, when Mr. MacDonald's only income consisted of employment insurance benefits. Nor is she claiming that the judge erred by not imputing income to Mr. MacDonald.

[24] What Ms. MacDonald argues is that, although the judge outlined a background that established a compensatory claim and found entitlement to spousal support on compensatory as well as non-compensatory grounds, he did not consider the compensatory aspect in determining quantum once Mr. MacDonald had the ability to pay. According to the appellant, the judge failed to review all the factors outlined in the *Divorce Act*, failed to look beyond the parties' situation as it existed at trial, and failed to apply the Guidelines.

[25] I will begin with the Guidelines. At trial, Ms. MacDonald had suggested that in setting the quantum of spousal support, one had to take the Guidelines into account. In her written brief to the judge, she had referred to various scenarios for the suggested range. In his decision, the judge neither referred to the Guidelines nor explained why they were not followed. He determined a quantum substantially lower than those in the range she had proposed.

[26] Ms. MacDonald submits that his failure to follow the Guidelines, or explain why he did not do so, amounts to error which calls for appellate intervention. In support of her argument, she relies on *Smith v. Smith*, 2011 NBCA 66. There, Quigg, J.A., writing for the New Brunswick Court of Appeal, stated:

> [49] . . . However, in order to avoid the appearance of arbitrary decision-making, a trial judge should give reasons for spousal support awards above or below the *Guideline* amounts. Failing to give reasons or giving reasons based on erroneous fact-finding subjects trial decisions to appellate review. In this case, the trial judge's decision was unsupported by the evidence, and the result of palpable and overriding errors of fact. The context provided by the trial judge's decision, along with the trial transcripts, allows us to determine a more appropriate result without having to order a new trial.
>
> [50] In order to promote consistency in spousal support awards generally and provide fairness in the case at bar, this Court should look to the *Guidelines* when ordering a new spousal support award… .

[27] With respect, not only is *Smith* not binding on this Court, but it is distinguishable. In *Smith*, the trial judge concluded that, in the particular circumstances before him, certain exceptions to the Guidelines were applicable. The appellate court found that, in upholding those exceptions, he had made reversible errors of fact. It specifically rejected the argument that a trial judge "must" utilize the Guidelines when determining spousal support and, after reviewing several decisions, summarized:

> [37] While the *Guidelines* help to promote consistency in judgments, and therefore a greater measure of certainty in law, they do not constitute law. Therefore, while judges would be wise to follow the *Guidelines*, and usually do so, they should not be mandated to do so even when their reasons for decision do not bring into play an exception listed in ch. 12 of the *Guidelines*.

Moreover, Ms. MacDonald presented only a portion of the first sentence of ¶ 50 in *Smith*. A reading of that sentence in its entirety shows that the Court of Appeal there applied the Guidelines only because it was clear that, had he not erred in his finding of exceptional circumstances, the trial judge would have applied them.

[28] Trial judges may find the Guidelines useful in setting the amount of spousal support. They are widely used in spousal support decisions. D.A. Thompson in *Ideas of Spousal Support Entitlement*, (2014) 34 CFLQ 1 at pg. 19 noted that their use is "endorsed and encourage[d] … in British Columbia, New Brunswick, Ontario, P.E.I., Saskatchewan and Manitoba … ." However, there appears to be no appellate court or Supreme Court of Canada decisions that make their use a firm requirement.

[29] In this Province, the law remains that set out in *Strecko v. Strecko*, 2014 NSCA 66 where this Court considered whether a judge's failure to apply the Guidelines was an error. The Court held:

> [49] In *Yemchuk v. Yemchuk*, 2005 BCCA 406, at ¶ 64, Prowse J.A. described the Guidelines as a useful tool, but only advisory rather than legislated or binding. In *Smith v. Smith*, 2011 NBCA 66, Quigg, J.A. for the New Brunswick Court of Appeal stated that:
>
> > [34] Although the *Guidelines* are not law *per se*, following them can enhance the legitimacy of a spousal support award, as the *Guidelines* promote consistency and therefore aid in the avoidance of arbitrary decision-making.
> >
> > …

> [37] While the *Guidelines* help to promote consistency in judgments, and therefore a greater measure of certainty in law, they do not constitute law. Therefore, while judges would be wise to follow the *Guidelines*, and usually do so, they should not be mandated to do so even when their reasons for decision do not bring into play an exception listed in ch. 12 of the *Guidelines*.

See also *Fisher v. Fisher*, 2008 ONCA 11, where Lang, J.A. writing for the Court stated:

> [103] In my view, when counsel fully address the Guidelines in argument, and a trial judge decides to award a quantum of support outside the suggested range, appellate review will be assisted by the inclusion of reasons explaining why the Guidelines do not provide any appropriate result. This is not different than a trial court distinguishing a significant authority relied upon by a party.

[50] Since the law does not oblige the judge to apply the Guidelines, I see no error in law in his choosing not to do so.

The same principles apply here.

[30] I now turn to the argument that the judge failed to review all the factors mandated by the *Divorce Act*. Sections 15.2(4) and (6) provide:

> (4) In making an order under subsection (1) …, the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.
>
> …
>
> (6) An order made under subsection (1) … that provides for the support of a spouse should
>
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[31] The judge did not quote those provisions in his reasons. However, he referred to the factors and objectives set out in s. 15.2(4) and (6) to be considered in a spousal support claim. The judge also observed that the Supreme Court of Canada had set out three conceptual grounds for entitlement for spousal support in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, namely, compensatory, non-compensatory, and contractual.

[32] Ms. MacDonald argues that, while the judge referred to the objectives and factors set out in s. 15.2(4) and (6) of the *Divorce Act*, he failed to consider them.

[33] The judge did not sequentially review the evidence against each of the factors and objectives in s. 15.2(4) and (6). However, it is apparent from his finding of entitlement on both a compensatory and a non-compensatory basis, and his references to the "means, needs and circumstances of each spouse" and self-sufficiency, that he turned his mind to the economic advantages or disadvantages to the parties arising from their marriage and its breakdown.

[34] The judge's decision shows that he was aware that the parties had been married for a long time and of their roles during their marriage. In his ¶ 5, he referred to the parties' separation "following 25 years of marriage". It was undisputed that Mr. MacDonald had been the main breadwinner and Ms. MacDonald had maintained their home and raised their children. His reasons recognized that, when they were working, Mr. MacDonald earned considerably more than Ms. MacDonald was able to earn.

[35] While the trial judge reviewed the particular objectives and factors set out in s. 15.2(4) and (6) with respect to **entitlement** to spousal support, it is difficult to discern just what he did in determining the **quantum** of spousal support. In particular, how—if at all—the compensatory aspect of entitlement was taken into account when he set $1,000 per month as the appropriate amount for the period when Mr. MacDonald was able to pay, is not apparent.

[36] The trial judge stated: "From November 2014 to and including September 2015, the petitioner was in need and the respondent had the ability to pay." While there was no elaboration of the "need", some part of the amount he ordered had to have been compensatory, since he had found entitlement on both compensatory and non-compensatory grounds.

[37] Ms. MacDonald argues that in determining quantum, the judge erred in his calculation of the amount Mr. MacDonald had available to pay spousal support. The judge wrote:

> [19] … The respondent's 2015 statement of expenses adjusted monthly based on $150,000 income for the year would leave him with a surplus of approximately $3300 per month, factoring in income tax calculation at 46%.

Ms. MacDonald attacks the monthly surplus figure, arguing that there was no evidentiary basis in support, and Mr. MacDonald's ability to pay spousal support was much higher. Having examined the record and the transcript of the hearing, I would reject this argument.

[38] The 2015 statement of expenses is an unsworn and unsigned document headed "Statement of Expenses of Lawrence Bernard MacDonald PREPARED ON March 20, 2015". At trial, it was introduced as an exhibit and went in without objection. Mr. MacDonald was cross-examined about the expenses shown on it.

[39] The original document in the court file shows that several typed entries had been struck and new numbers inserted by hand. For example, on the original, the figure for the monthly Total Income Before Tax was $22,337.87 and for the monthly Surplus (Deficit) was $18,107.11. The handwritten numbers for those entries were much lower, at $12,500 and $3,357.34 respectively.

[40] Under cross-examination, Mr. MacDonald corrected two of the expense entries on the original document: $1,000 per month for heat should have been $2,500 for the year, and $300 per month for clothing should have been $100. On the document, the figure for heat was replaced with $100. No change was made to that for clothing. The original expenses figure of $4,230.76 was crossed out and $3,330.16 written in.

[41] Mr. MacDonald was not questioned about the $22,337.87 shown for monthly Total Income Before Tax. The handwritten notations changed that amount to $12,500 and also read "12,500.00 recently on $150,000".

[42] No income tax figure had been entered on the original March 20, 2015 Statement of Expenses. While it does not appear on the copy in the appeal book, there is a Post-it note affixed to that exhibit in the court file reading:

Tax – 150,000
– 29% Federal
– 17.5% Province
69,750
÷ 12 mts
5812.50

The "5,812.50" figure was inserted on the document for Income Tax Payable. The revised income and expenses figures, and the new tax figure, were used to calculate the monthly surplus of $3,357.34.

[43] The suggestion that someone other than the trial judge might be responsible for the notes on the document is without merit. The notations on the March 20, 2015 Statement of Expenses substantially track the testimony the judge had heard. The heat expense was lower than what Mr. MacDonald had testified, but effectively incorporated most of the correction to the clothing expense. The revised annual income figure of $150,000 is not far off the approximately $154,000 that Mr. MacDonald testified he had earned from November 2014 to November 2015. Furthermore, after he was shown the March 20, 2015 Statement of Expenses, his evidence about his typical annual wage range was that, over the last 15 to 20 years, it was $150,000 plus.

[44] The only figure not brought out in evidence or discussed in court is the monthly income tax figure of $5,812.50. It appears that the judge made this calculation using the federal and provincial tax rates applicable to an income of $150,000. Ms. MacDonald did not strenuously argue that these were incorrect.

[45] I observe that there was no evidence that, in determining Mr. MacDonald's monthly surplus, the judge's calculation had included all or a portion of the $4,000 monthly payments to the Trustee which Mr. MacDonald started paying after he found work again in November 2014. The judge had referred to them in his reasons. That figure did not appear in the original March 2015 Statement of Expenses, although those payments were then being made. Mr. MacDonald was not questioned about its omission, but his counsel in his closing submissions had explicitly linked those bankruptcy payments to his client's ability to pay spousal support and asked for them to be set off or somehow deducted during the period that Mr. MacDonald was employed. Had the judge included all or a portion of that

payment, the surplus would have been less. Indeed, there could have been a monthly deficit.

[46] How the judge addressed this, and why the $4,000 was not included in the calculation of Mr. MacDonald's surplus or deficit, is found in the following passage from his reasons:

> [15] In May 2014 the respondent filed for bankruptcy. **His debts included matrimonial debts as well as debts incurred post-separation which he estimated at $20,000. Matrimonial debts included mortgage payments, Visa and line of credit.** The respondent's equalization from the sale of the matrimonial home in the amount of $18,300 was paid to the Trustee for the benefit of creditors.
>
> [16] The respondent returned to work in November 2014. As a result he was required to pay $4,000 per month to the trustee. According to the Trustee's ledger report the respondent has paid a total of $47,616 as of November 2015. **The respondent continues to pay $4,000 per month and expects to be discharged from bankruptcy in February 2015.** If this happens the respondent would have paid the Trustee $59,000 of which $39,000 paid towards matrimonial debts. The mortgage would have been paid off at the time of the sale of the property.
>
> [17] **I should mention at this time that as the petitioner did not file for bankruptcy, she would notionally be responsible for any outstanding matrimonial debts. There is no evidence before me that this would be the case following the respondent's discharge from bankruptcy.** Although the petitioner's credit report shows these debts, the notations indicated they are not collectible and are written off. The petitioner is not making payments on these debts nor are the creditors pursuing her.
>
> [Emphasis added]

[47] It seems that, in accordance with Mr. MacDonald's submissions, the judge classified $20,000 of Mr. MacDonald's debt as post-separation debt and $39,000 as matrimonial debt. While he commented that Ms. MacDonald was "notionally" co-responsible for the matrimonial debt, her creditors had written off the debts in her name. As they were non-recoverable, the judge did not "set off" the matrimonial debts that Mr. MacDonald was paying off through his bankruptcy.

[48] Mr. MacDonald did not cross-appeal on the basis that, in determining his surplus, the judge erred by failing to take into account his payments to the Trustee. That being the case, and where the judge addressed them, there is no need for me to comment further.

[49] I am satisfied that there was no error which would justify appellate intervention in the judge's calculation of Mr. MacDonald's monthly surplus at $3,300.

[50] I return to the question: why was Ms. MacDonald only entitled to $1,000 per month from November 2014 to and including September 2015 in compensatory and non-compensatory spousal support?

[51] The disparity in the parties' incomes during the period for which the judge ordered monthly spousal support is striking. Mr. MacDonald's income from November 2014 to November 2015 was approximately $154,000. This works out to approximately $138,500 for the period November 2014 to September 2015. Ms. MacDonald's income for the same period was some $63,583.

[52] The roles the parties adopted during their lengthy marriage resulted in adverse economic consequences for Ms. MacDonald when their marriage ended. In her June 10, 2015 affidavit, Ms. MacDonald deposed that since separation, she had had 11 jobs, had not been able to find anything permanent, and her sporadic income meant she had had difficulty maintaining accommodation. Her Statement of Expenses of the same date showed a monthly deficit of some $865. There was no evidence indicating that her situation changed before she and her new partner moved in together in October 2015. The $1,000 per month the judge awarded might satisfy her need as reflected in her monthly deficit of some $865, but it does not address the compensatory aspect he identified.

[53] In *Gates v. Gates*, 2016 NSSC 49, Jesudason, J. provided a helpful summary of the principles from the authorities, including *Bracklow*, *Moge v. Moge*, [1992] 3 S.C.R. 813, and jurisprudence from this province, on the various issues pertaining to spousal support. With respect to quantum, he wrote:

> [63] ...
>
> **b) Quantum**
>
> - The factors that go to entitlement also have an impact on quantum although, for practical purposes, it is often useful to proceed by establishing entitlement first and then effecting necessary adjustments through quantum. The real issue, however, is what support, if any, should be awarded in the situation before the judge on the factors set out in the *Divorce Act* (*Bracklow*, at para. 50);
>
> - Fixing the amount of spousal support is a discretionary exercise after considering the factors set out in s. 15.2(4) of the *Divorce Act*

and the objectives of spousal support orders as set out in s. 15.2(6) (*Bracklow*, at para. 18);

- All four objectives enumerated in s. 15.2(6) of the *Divorce Act* are to be borne in mind in making an award of spousal support, and none is paramount. (*Bracklow*, at para. 35);
- There is no hard and fast rule. The judge must look at all the factors in the light of the stipulated objectives of support, and exercise his or her discretion in a manner that equitably alleviates the adverse consequences of the marriage breakdown (*Bracklow*, at para. 36);
- While some factors may be more important than others in a particular case, the judge cannot proceed at the outset by fixing on only one variable. The quantum awarded, both in the sense of amount and duration, will vary with the circumstances and practical and policy considerations affecting any given case (*Bracklow*, at para. 53);
- The fundamental principles in spousal support cases are balance and fairness. The goal is an order that is equitable having regard to all of the relevant circumstances (*Fisher v. Fisher*, 2001 NSCA 18, at para. 82);
- The duty of support is on the payor to provide "reasonable support". The key question is what is reasonable support having regard to all the circumstances (*Saunders v. Saunders*, 2011 NSCA 81 at para. 53; *Read v. Read*, 2000 NSCA 33 at para. 12; and *Mosher v. Mosher* (1999), 177 N.S.R. 236 (S.C.) at p. 238);
- It does not follow that the quantum of spousal support must always equal the amount of the need which is established. For example, nothing forecloses making an order for support for a portion of a spouse's need, whether viewed in terms of amount or duration (*Bracklow*, at para. 54); and
- As marriage should be generally regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (*Moge* at p. 870). However, length of marriage is only one factor which the judge must consider. Thus, the general expectation for long-term marriages towards a more equal standard of living upon marital breakdown is not an immutable rule constraining the factors applicable to determining quantum of spousal support (*Bracklow*, at para. 54).

[54] Non-compensatory spousal support focuses on the needs of the spouses and their respective means, as well as the nature and duration of the marital relationship (*Bracklow*, particularly at ¶ 53). Compensatory support aims to redress economic disadvantage arising from the marriage or economic advantages enjoyed by one spouse because of efforts by the other. Its main goal is to provide for an equitable sharing of the economic consequences of the marriage (*Moge*, at ¶ 858-866).

[55] The judge's award of spousal support of $1,000 per month for the period of November 2014 to September 2015 considered Ms. MacDonald's needs; namely, her monthly deficit of some $865. There is no explanation or analysis as to how he arrived at that amount of spousal support during a period that Mr. MacDonald was enjoying a $3,300 monthly surplus. The quantum he determined neither addresses nor satisfies the compensatory aspect of Ms. MacDonald's entitlement to spousal support. His failure to do so means that, in making his order, he failed to consider all the objectives in s. 15.2(6) of the *Divorce Act* and so erred in law.

[56] I must then determine what is the appropriate amount of support. In *Saunders v. Saunders*, 2011 NSCA 81, Farrar, J.A., writing for the Court, stated:

> [53] In *Read v. Read*, 2000 NSCA 33, Freeman, J.A. quoting Justice Goodfellow in *Mosher v. Mosher* (1999), 177 N.S.R. (2d) 236 (S.C.) at 238 to the effect that the duty of support is on the payor to provide reasonable support. The key question in this case is what is reasonable support having regard to all the circumstances.

[57] The spousal support to be awarded contains both compensatory and non-compensatory elements. Having considered the factors and objectives in s. 15.2(4) and (6) and the circumstances of the parties between November 2014 and September 2015, which I have recounted, I would award Ms. MacDonald $2,500 per month for spousal support for that period. In my view, this provides reasonable and fair support in all the circumstances.

Retroactive Spousal Support and Self-Sufficiency

[58] According to Ms. MacDonald, the trial judge erred by limiting the period of retroactivity to November 2014 to September 2015. She refers to ¶ 20 and 21 of his reasons where he found that she was entitled to spousal support at the time of separation (September 2013) and that, while she was in need of spousal support following separation, Mr. MacDonald had no ability to pay. Ms. MacDonald points

out that although he had stopped working just before their separation, Mr. MacDonald earned over $165,000 in 2013. She says that the judge failed to consider those earnings and erroneously found that Mr. MacDonald did not have the means to pay spousal support.

[59] There was no evidence before the trial judge that showed that Mr. MacDonald had the ability to pay spousal support before November 2014. The respondent had declared bankruptcy several months earlier. His earliest Statement of Property which was sworn on October 3, 2014 set out two assets—a 2000 vehicle worth $6,000 in the possession of Ms. MacDonald, and some $500 in a bank account. Nothing in his testimony suggested accumulated savings or other financial resources. In these circumstances, I cannot find any error.

[60] Ms. MacDonald also argues that the trial judge erred by ending retroactive spousal support in September 2015 when the evidence showed that Mr. MacDonald was working until November 2015.

[61] Nothing in the judge's reasons explains why he ended that support a month before the respondent was laid off. Ms. MacDonald argues that this shows that the judge erred by determining that she was self-sufficient on the basis of her re-partnering and that event in October 2015 was why he ended spousal support in September 2015. I am unable to agree.

[62] The judge's decision read in part:

> [22] The petitioner has demonstrated an ability to be self-sufficient over the past two years by earning sustainable income. She has entered into a relationship that enables her partner to contribute to her expenses. . . .

In my view, the judge's reference to her self-sufficiency was based on her employment and income over the past two years. Afterwards, he merely added an observation that, as was established by the evidence, Mr. Sutherland contributes to her expenses. In any event, there is nothing in this passage that links it to the date he ended monthly spousal support.

[63] The judge's failure to extend the retroactive spousal support to include October 2015 when Ms. MacDonald was in need of spousal support and Mr. MacDonald had the ability to pay was an error justifying appellate intervention. I would extend the period for which Mr. MacDonald is to pay Ms. MacDonald $2,500 in monthly spousal support to include October 2015.

[64] Ms. MacDonald submits that the judge misinterpreted the meaning of self-sufficiency in the context of a long-term traditional marriage, and he failed to consider her standard of living during the marriage, its duration, and other relevant factors as outlined in the *Divorce Act*. She relies on *Fisher v. Fisher*, 2008 ONCA 11 at ¶ 52 and 53 and *Allaire v. Allaire*, [2003] O.J. No. 1069 (ONCA) at ¶ 21. I have considered self-sufficiency in my determination of a reasonable quantum of retroactive spousal support and need not address this further.

Quantum of Ongoing Spousal Support

[65] At trial in December 2015, both parties were unemployed and receiving employment insurance benefits. The judge ordered Mr. MacDonald to pay Ms. MacDonald $1.00 per annum spousal support effective January 1, 2016 "In order to preserve the petitioner's right to support in the future, regarding any material change in circumstance." Ms. MacDonald says that he erred in two ways: first, he placed an "unnecessary/unreasonable burden" on her to prove a material change in circumstance in a future application for spousal support and, second, he failed to take into account Mr. MacDonald's pattern of work where often he was laid off and shortly rehired. She says that the judge should have continued spousal support payments when Mr. MacDonald was working, effective February 2015 which is when he hoped to be discharged from bankruptcy.

[66] I would dismiss this ground of appeal. It was impossible to say if the cyclical pattern of work would repeat, or when the discharge from bankruptcy would be achieved. The Corollary Relief Order includes the usual provisions requiring the parties to provide each other with a copy of their annual income tax return and notices of assessment. When Mr. MacDonald returns to work or is discharged from bankruptcy, it would not be difficult for Ms. MacDonald to establish a material change of circumstances.

Costs

[67] The trial judge described the divorce proceeding which lasted a half day as "not complex," and as having only one issue, spousal support. While Ms. MacDonald had successfully obtained retroactive spousal support, Mr. MacDonald had successfully maintained that no spousal support should be payable on a prospective basis at that time. The judge ordered each party to bear their own costs.

[68] On appeal, Ms. MacDonald submits that the costs decision should be overturned in light of the judge's errors she raised in this appeal. I would dismiss this ground of appeal.

[69] An award of costs is a discretionary determination which will only be disturbed where wrong principles of law were applied or the decision is so clearly wrong as to amount to an injustice: *Volcko v. Volcko*, 2015 NSCA 11 at ¶ 10. In exercising his discretion, the judge considered and applied the correct principles with regard to costs and his decision is not so clearly wrong as to amount to an injustice.

Disposition

[70] I would order Mr. MacDonald to pay Ms. MacDonald spousal support of $2,500 per month for the period from November 2014 to and including October 2015. I would also order him to pay costs on the appeal of $2,000, inclusive of disbursements.

Oland, J.A.

Concurred in:

Beveridge, J.A.

Farrar, J.A.